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15 Distributing Inc., Warner Bros. Home
16 Entertainment Inc., Warner Communications
17 Inc., TW UK Holdings Inc., Robert Lorenz,
18 Michele Weisler, and Randy Brown

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GOLD GLOVE PRODUCTIONS,
LLC, a California Limited Liability
Company and RYAN A. BROOKS, an
individual,

Plaintiffs,

v.

DON HANDFIELD, an individual,
TRESSA DIFIGLIA HANDFIELD, an
individual, RANDY BROWN, an
individual, MICHELE WEISLER, an
individual, CHARLES FERRARO, an
individual, JAY COHEN, an individual,
ROBERT LORENZ, an individual,
UNITED TALENT AGENCY, INC., a
California corporation, THE GERSH
AGENCY, a California corporation,
WARNER BROS. PICTURES INC., a
Delaware corporation, MALPASO
PRODUCTIONS, LTD., a California
corporation, WARNER BROS.
DISTRIBUTING INC., a Delaware
corporation, WARNER BROS. HOME
ENTERTAINMENT INC., a Delaware
corporation, WARNER BROS.
DOMESTIC TELEVISION

Case No. CV13-07247-DSF (RZx)

**WARNER DEFENDANTS' NOTICE
OF MOTION AND MOTION FOR
SUMMARY JUDGMENT**

FILED HEREWITH: DECLS. OF
RANDY BROWN, NEIL LANDAU, BILL
SHEINBERG, GERARD BOCCACCIO,
MARCY MORRIS, SCOTT COOPER,
AND ASHLEY PEARSON; NOTICE OF
LODGING OF *TROUBLE WITH THE
CURVE* DVD; DVD OF MOTION
PICTURE TROUBLE WITH THE CURVE;
[PROPOSED] STATEMENT OF
UNCONTROVERTED FACT AND
CONCLUSIONS OF LAW; [PROPOSED]
JUDGMENT; AND NOTICE OF
INTERESTED PARTIES

The Hon. Dale S. Fischer

Hearing Date: February 24, 2014
Hearing Time: 1:30 p.m.
Courtroom: 840

WARNER DEFS.' MOTION FOR
SUMMARY JUDGMENT

1 DISTRIBUTION, INC., a Delaware
2 corporation, TW UK HOLDINGS,
3 INC., a Delaware corporation, and
4 DOES 1-10, inclusive

5 Defendants.
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1 TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on February 24, 2014, at 1:30 p.m., or as soon
 3 thereafter as counsel may be heard by the above-entitled court, located in
 4 Courtroom 840 at 312 North Spring Street, Los Angeles, California 90012,
 5 defendants Warner Bros. Studio Enterprises Inc., Warner Bros. Distributing Inc.,
 6 Warner Bros. Home Entertainment Inc., Warner Communications Inc., TW UK
 7 Holdings Inc., The Malpaso Company, Inc., Randy Brown, Michele Weisler, and
 8 Robert Lorenz (collectively, the “Warner Defendants”) will and hereby do move for
 9 summary judgment in the above-captioned case.¹ The Warner Defendants
 10 understand that the other defendants in this case will file parallel motions, seeking
 11 the same and additional relief. The plaintiffs in this case are Ryan Brooks and his
 12 production company Gold Glove Productions, LLC (collectively, “Plaintiffs”).

13 This motion is made following the conference of counsel pursuant to Central
 14 District Local Rule 7-3 and the Court’s Standing Order, Docket No. 6 at 7. *See*
 15 Decl. of Ashley Pearson (“Pearson Decl.”) ¶ 6; Exs. G-J.

16 This summary judgment motion is made under Rule 56(b) of the Federal
 17 Rules of Civil Procedure. *See* C. Wright, et al., 10A FEDERAL PRACTICE &
 18 PROCEDURE (“WRIGHT & MILLER”) § 2718, at 301 (3d ed. 1998) (“A defending
 19 party is not required by the rule to file an answer before moving for summary
 20 judgment.”). It is based on the following grounds:

21 1. Every one of Plaintiffs’ 12 claims for relief in this case—8 of which
 22 they assert against the Warner Defendants—hinges on the contention that
 23 defendants copied the 2012 motion picture *Trouble with the Curve* (“TWTC”)

24
 25 ¹ Plaintiffs’ complaint erroneously names three of the nine Warner Defendants.
 26 It names defendant Warner Bros. Studio Enterprises Inc. as “Warner Bros. Pictures
 27 Inc.”; Warner Communications Inc. as “Warner Bros. Domestic Television
 Distribution, Inc.”; and The Malpaso Company, Inc. as “Malpaso Productions,
 Ltd.” *See* Docket Nos. 1; 28; 45 at 2.

28 The parties agreed to extend the hearing date on this motion.

from Plaintiffs' 2008 script *Omaha* and/or a short 2007 video that Plaintiffs made to promote *Omaha*. *See* Docket No. 28, Pls.' First Am. Cmplt. (or "FAC") ¶¶ 199, 210, 224, 237, 252, 254, 259, 269, 279, 284, 290, 293.²

2. Plaintiffs' copying claims—made in a 113-page complaint and dressed up with claims of RICO conspiracy and criminal theft, *see, e.g.*, FAC ¶¶ 265-70—are legally and factually without basis.

a. Warner Defendant Randy Brown wrote *TWTC* in the 1990s, starting while in a screenwriting class at UCLA. *See* Decl. of Randy Brown ("Brown Decl.") ¶ 2-6; Decl. of Neil Landau ("Landau Decl.") ¶ 2-6. Mr. Brown sold his completed *TWTC* script to a third-party production company, The Bubble Factory, in late 1997. *See* Brown Decl. ¶ 11-14; Decl. of Bill Sheinberg ("Sheinberg Decl.") ¶ 3, 8 & Exs. D-E, G-H; Decl. of Gerard Bocaccio ("Bocaccio Decl.") ¶ 4; Decl. of Marcy Morris ("Morris Decl.") Exs. A-B.

b. Numerous copies of Mr. Brown's *TWTC* script—all predating *Omaha* by many years—as well as other contemporaneous evidence of its contents (including letters promoting the script in the 1990s, and a 1997 "Coverage Report" summarizing it) were preserved and are submitted under oath by witnesses with no financial stake in *TWTC* or this case. *See* Sheinberg Decl. Exs. A-C, F, I-P; Bocaccio Decl. ¶ 5; Morris Decl. Ex. C.

c. These 1990s *TWTC* scripts that Mr. Brown authored show that every material element that Plaintiffs allege that defendants copied preexisted in Mr. Brown's 1990s *TWTC* scripts. *See* Pearson Decl. Appendix 1 & Exs. B at 45-49, G; Landau Decl. ¶ 13; Sheinberg Decl. Exs. A, C, F; Morris Decl. Ex. C; Brown Decl. ¶ 10 & Exs. A-J.

d. This extensive and overwhelming evidence of prior creation—which refutes any claim of copying under the well-established case law—cannot

² Plaintiffs do not list the Warner Defendants as defendants in their Fourth, Sixth, Tenth, and Eleventh Claims for Relief. *See also infra* n.3.

1 reasonably be disputed and shows that Plaintiffs' claims of copying are
 2 without merit and should be dismissed now, with prejudice. *See, e.g.,*
 3 *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1128 (9th Cir. 2002) ("it is
 4 impossible to copy something that does not exist").

5 3. Plaintiffs make fanciful, conclusory, and legally irrelevant claims that
 6 the Warner Defendants' evidence of prior creation is a "fraud," but such
 7 argument cannot defeat this motion. *See, e.g., Far Out Prods., Inc. v. Oskar,*
 8 247 F.3d 986, 997 (9th Cir. 2001) (a nonmoving party "cannot preclude
 9 summary judgment simply by alleging that [a witness] committed fraud [in
 10 submitting evidence]; [it] must raise a genuine issue of material fact as to
 11 each of the elements" of its claim); *Bauer v. Yellen*, 548 F. Supp. 2d 88, 94
 12 (S.D.N.Y. 2008) (granting summary judgment on an infringement claim
 13 where defendant submitted evidence that prior to review of plaintiff's script,
 14 defendant's script was "conceived, committed to script form, ... and shopped
 15 to more than one production company"; plaintiffs "conjecture [and]
 16 questioning the authenticity of virtually every piece of information provided
 17 by defendants" was insufficient to defeat summary judgment).

18 The Warner Defendants' motion for summary judgment should be granted
 19 and this case should be brought to a halt before defendants have to incur any further
 20 costs in defending it. The Warner Defendants appreciate that early summary
 21 judgment motions are not the norm, but this case calls out for it, especially given
 22 the salaciousness of the complaint and Plaintiffs' abject refusal to face the reality—
 23 attested to by various third-party witnesses—that Mr. Brown wrote *TWTC* in the
 24 1990s. *See Mann v. Lee*, 2009 WL 5178095, at *2 (N.D. Cal. Dec. 22, 2009)
 25 ("defendants were not required to file a responsive pleading before filing a motion
 26 for summary judgment"); J. Stempel & S. Gensler, 11MOORE'S FEDERAL PRACTICE
 27 - CIVIL § 56.60 (2013) (Rule 56 amended in 1946 and 2009 so that now, "[n]o party
 28 has to wait for a responsive pleading before filing a summary judgment motion").

1 If the Court is disinclined to dismiss the case now, the Warner Defendants
2 ask to discuss a focused Scheduling Order to try this case on a streamlined basis,
3 including addressing further threshold, legal infirmities that bar Plaintiffs' claims.

4 This motion for summary judgment is based on this Notice of Motion and
5 accompanying Memorandum of Points and Authorities; the concurrently filed
6 Declarations of Ashley Pearson, Neil Landau, Bill Sheinberg, Gerard Bocaccio,
7 Marcy Morris, Randy Brown, and Scott Cooper; the concurrently filed Statement of
8 Uncontroverted Facts and Conclusions of Law (cited herein as "SUF"); the
9 concurrently filed Proposed Judgment; the concurrently filed Notice of Lodging
10 and accompanying *Trouble with the Curve* DVD lodged with the Court; and such
11 additional submissions and argument, including any reply briefing, as may be
12 presented at or before the hearing on this motion.

13 Dated: December 4, 2013

Respectfully submitted,

14 O'MELVENY & MYERS LLP

15 By: /s/ Matthew T. Kline

16 Matthew T. Kline
17 Lead Counsel for Warner Defendants

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TABLE OF CONTENTS

2	I.	INTRODUCTION	1
3	II.	FACTUAL BACKGROUND	1
4	III.	THE WARNER DEFENDANTS ARE ENTITLED TO JUDGMENT	6
5	A.	Prior Creation Bars A Claim Of Copying.....	6
6	B.	Mr. Brown Created <i>TWTC</i> Many Years Before <i>Omaha</i>	7
7	C.	Plaintiffs' Efforts To Stave Off Judgment Are Without Merit.....	13
8	IV.	CONCLUSION	16

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 <i>Armour v. Knowles</i> ,	4 512 F.3d 147 (5th Cir. 2007).....	8, 9
5 <i>Art Attacks Ink, LLC v. MGA Entm't Inc.</i> ,	6 581 F.3d 1138 (9th Cir. 2009).....	14
7 <i>Bauer v. Yellen</i> ,	8 548 F. Supp. 2d 88 (S.D.N.Y. 2008).....	<i>passim</i>
9 <i>Bernal v. Paradigm Talent & Literary Agency</i> ,	10 788 F. Supp. 2d 1043 (C.D. Cal. 2010).....	7, 9
11 <i>Berry v. Deutsche Bank Trust Co. Ams.</i> ,	12 632 F. Supp. 2d 300 (S.D.N.Y. 2009).....	13
13 <i>Christian v. Mattel, Inc.</i> ,	14 286 F.3d 1118 (9th Cir. 2002).....	7
15 <i>Cortez-Pineda v. Holder</i> ,	16 610 F.3d 1118 (9th Cir. 2010).....	7-8
17 <i>Cottrill v. Spears</i> ,	18 87 Fed. Appx. 803 (3d Cir. 2004)	<i>passim</i>
19 <i>Eaton v. NBC</i> ,	20 972 F. Supp. 1019 (E.D. Va. 1997).....	15
21 <i>Far Out Prods., Inc. v. Oskar</i> ,	22 247 F.3d 986 (9th Cir. 2001).....	14
23 <i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> ,	24 499 U.S. 340 (1991)	15
25 <i>Fodor v. Time Warner, Inc.</i> ,	26 1994 WL 65287 (9th Cir. Mar. 2, 1994)	15
27 <i>Fogerty v. MGM Grp. Holdings Corp.</i> ,	28 379 F.3d 348 (6th Cir. 2004).....	8
28 <i>Gen. Universal Sys. v. Lee</i> ,	29 379 F.3d 131 (5th Cir. 2004).....	13

1	<i>Grubb v. KMS Patriots, L.P.,</i>	7
2	88 F.3d 1 (1st Cir. 1996)	
3	<i>Jason v. Fonda,</i>	9
4	526 F. Supp. 774 (C.D. Cal. 1981), <i>aff'd</i> 698 F.2d 966 (9th Cir. 1982).....	
5	<i>Kenney v. Warner Bros. Entm't, Inc.,</i>	7, 15
6	2013 WL 6212593 (D. Mass. Dec. 3, 2013)	
7	<i>King v. Najm,</i>	14
8	Case No. CV 08-4164, Docket No. 116 (DSF) (C.D. Cal. Mar. 8, 2011)	
9	<i>Latin Am. Music Co. v. Am. Society of Composers,</i>	14
10	642 F.3d 87 (1st Cir. 2011)	
11	<i>Linder v. Pac. Dataware, Inc.,</i>	14
12	1997 WL 91713 (D. Or. Jan. 15, 1997).....	
13	<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,</i>	13
14	475 U.S. 574 (1986)	
15	<i>Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co.,</i>	14
16	701 F.2d 95 (9th Cir. 1983).....	
17	<i>Rice v. Fox Broad. Co.,</i>	14
18	330 F.3d 1170 (9th Cir. 2003).....	
19	<i>Scott-Blanton v. Universal City Studios Prods. LLLP,</i>	13
20	539 F. Supp. 2d 191 (D.D.C. 2008)	
21	<i>Selle v. Gibb,</i>	9, 15
22	567 F. Supp. 1173 (N.D. Ill. 1983).....	
23	<i>Selmon v. Hasbro Bradley, Inc.,</i>	7
24	669 F. Supp. 1267 (S.D.N.Y. 1987)	
25	<i>Siddiqui v. AG Commc'ns Sys. Corp.,</i>	14
26	233 Fed. Appx. 610 (9th Cir. 2007)	
27	<i>Stewart v. Wachowski,</i>	15
28	574 F. Supp. 2d 1074 (C.D. Cal. 2005).....	
27	<i>Weygand v. CBS,</i>	9
28	1997 U.S. Dist. LEXIS 10613 (C.D. Cal. May 20, 1997).....	

1	STATUTES	
2	CAL. BUS. & PROF. CODE § 17200.....	2
3	OTHER AUTHORITIES	
4	FED. R. CIV. P. 56.....	13
5	M.B. & D. Nimmer, 4 NIMMER ON COPYRIGHT § 13.01 (2011).....	<i>passim</i>
6	W. Patry, 3 PATRY ON COPYRIGHT § 9:36 (2013).....	6, 7
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1 **I. INTRODUCTION**

2 Plaintiffs' claims in this case all pivot on one dispositive issue: whether
 3 Randy Brown wrote the script for the 2012 motion *Trouble with the Curve*
 4 ("TWTC") prior to 2005, when plaintiffs commissioned a screenplay for the movie
 5 *Omaha*, from which they say TWTC was copied. Proof of prior creation of TWTC
 6 bars all of Plaintiffs' claims in this case, and extensive, indisputable evidence
 7 establishes that Mr. Brown wrote multiple drafts of TWTC in the 1990s, and that
 8 these scripts contain all of the material elements that Plaintiffs assert were copied
 9 from *Omaha*. None of the personal insults or twisted conspiracy theories that
 10 Plaintiffs assert can overcome this lynchpin fact. Nor can their claims that the
 11 Warner Defendants "manufactured" the mass of evidence that disproves Plaintiffs'
 12 claims. This is a simple case. This summary judgment motion should be granted.

13 **II. FACTUAL BACKGROUND**

14 TWTC is a movie about baseball released in 2012. A DVD copy of TWTC
 15 has been lodged with the Court, *see* Notice of Lodging (filed herewith), and it
 16 credits Warner Defendant Randy Brown as the screenwriter. TWTC was directed
 17 by Warner Defendant Robert Lorenz, produced by Warner Defendant Michele
 18 Weisler, among others, and distributed by Warner Defendants Warner Bros.
 19 Distributing Inc. and Warner Bros. Home Entertainment Inc. Clint Eastwood
 20 starred in the movie as the aging baseball scout "Gus," and Amy Adams co-starred
 21 as Gus's daughter "Mickey." Justin Timberlake played a scout/former-baseball-
 22 prospect/Mickey's-love-interest, "Johnny." *See, e.g.*, Pearson Decl. Ex. A.

23 Plaintiffs have also named several non-Warner Defendants as defendants,
 24 claiming they conspired with the Warner Defendants to "steal" *Omaha* and copied
 25 it to create TWTC. *See, e.g.*, FAC ¶ 199; *infra* n.3. These additional defendants are
 26 Don and Tressa Handfield, who Plaintiffs say wrote the *Omaha* script at Plaintiffs'
 27 direction; Mr. Hanfield's former agent (Charles Ferraro) and agency (United Talent
 28 Agency); and agent Jay Cohen and The Gersh Agency. *Id.*

1 Plaintiffs' complaint is 331 paragraphs long, but only one fact matters in this
 2 case. That is that Randy Brown wrote *TWTC* in the mid-1990s, some 10 years
 3 before Plaintiffs admit they first conceived and commissioned the script for the
 4 movie *Omaha*. *See* SUF 1; FAC ¶¶ 45, 46, 63. This simple fact of prior creation
 5 bars each of Plaintiffs' 12 claims for relief in this case—as each is premised on the
 6 allegation that defendants copied *TWTC* from *Omaha*.³

7

8 ³ *See* FAC ¶¶ 199 (**Claim 1**; copyright infringement; alleging a “willful, and
 9 malicious effort by Defendants/Co-Conspirators to steal the core plot and story of
 10 Gold Glove Productions’ copyrighted, original, protected expression of a father/
 11 daughter baseball story that was to be made into a motion picture, camouflage it,
 12 and pass it off as the script and later-made motion picture, *Trouble with the
 13 Curve*”), 210 (**Claim 2**; contributory copyright infringement; same), 224 (**Claim 3**;
 14 vicarious copyright infringement; same), 237 (**Claim 4**; breach of contract;
 15 “Defendants/Co-Conspirators Handfield and DiFiglia breached the[ir agreements
 16 with Plaintiffs] as part of the conspiracy alleged herein by providing copies of the
 17 original screenplay for *Omaha* ... to the other Co-Conspirators”), 252 (**Claim 5**;
 18 tortious interference; “Defendants/Co-Conspirators executed a plan to infringe upon
 19 Plaintiff Gold Glove Productions’ unique, copyrighted father-daughter baseball
 20 story”); 254 (**Claim 6**; unjust enrichment; “Defendants/Co-Conspirators Handfield
 21 and DiFiglia have benefited from the unauthorized use and/or appropriation of Gold
 22 Glove Productions’ copyrighted screenplay for *Omaha*”); 259 (**Claim 7**;
 23 conversion; “[e]ach Defendant, as part of the conspiracy alleged herein, wrongfully
 24 converted and disposed of Gold Glove Productions’ rights by misappropriating the
 25 screenplay *Omaha*”); 269 (**Claim 8**; RICO; “Defendants/Co-Conspirators infringed
 26 upon the three copyrighted scripts and the copyrighted concept reel of *Omaha* as
 27 part of a highly illegal scheme and scam”); 279 (**Claim 9**; CAL. BUS. & PROF. CODE
 28 § 17200; “Defendants’/Co-Conspirators’ conduct was fraudulent in that it
 attempted to deceive reasonable consumers by stealing the potential award-winning
 story of *Omaha* and passing it off to consumers as their own original work, by
 camouflaging it as the resulting infringing work, *Trouble with the Curve*”); 284
 (**Claim 10**; false promise; “[the Handfields had] been showing the proprietary
 scripts around to others, and ultimately copied this copyrighted work and tried to
 camouflage it as the work of another”); 290 (**Claim 11**; breach of the covenant of
 good faith and fair dealing; “[the Handfields] unfairly interfered with Gold Glove
 Productions’ right to receive the benefits of these contracts by... misappropriating
 and infringing Gold Glove Productions’ copyrights”); 293 (**Claim 12**; accounting;
 alleging “illegally derived profits” based on the alleged copying conspiracy).

1 Plaintiffs, of course, never approached defendants to discuss these claims of
 2 copying before filing this lawsuit. As soon as the complaint was filed, the Warner
 3 Defendants provided Plaintiffs with evidence that, despite their conspiracy theories:

- 4 • Mr. Brown wrote his *TWTC* script in the 1990s;
- 5 • His script contained all of the elements Plaintiffs claim were stolen;
- 6 • Mr. Brown sold his *TWTC* script to a third-party production company,
 The Bubble Factory, in 1997, and it marketed it widely; and
- 7 • Mr. Brown and others maintained physical and electronic copies of the
 1990s scripts and other documents and evidence to prove the above. *See*
 8 Pearson Decl. Ex. B.

9 Without taking a pause to review the evidence, Plaintiffs called this evidence of
 10 prior creation a “fraud” and “manufactured.” Pearson Decl. Exs. C-F.

11 To address these irresponsible claims and put this wasteful lawsuit to an end,
 12 the Warner Defendants retained computer forensics expert Scott Cooper to date the
 13 electronic copies of the *TWTC* scripts that Mr. Brown had saved on seven floppy
 14 disks. Mr. Cooper identified 10 readable *TWTC* files saved on the disks. *See*
 15 Cooper Decl. ¶ 8 & Ex. 1 at 4. He forensically dated each file to well before 2005,
 16 when Plaintiffs allegedly commissioned *Omaha*.⁴ The Warner Defendants apprised
 17 Plaintiffs of these results and invited Plaintiffs to take a pause in this litigation.

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 19
 20
 21 ⁴ *See id.* Ex. 1 at 3-4. Cooper forensically dated the files as follows: (1) a file
 22 named “Trouble 2 4.0,” last saved on the disk on March 17, 1997; (2) a file named
 23 “Trouble 2nd draft,” last saved on the disk on March 22, 1997; (3) a file named
 24 “Trouble 7 - Neil notes,” last saved on the disk on August 21, 1997; (4) a file
 25 named “Dan & Pat draft,” last saved on the disk on September 17, 1997; (5) a file
 26 named “Dan/Pat/Randy,” last saved on the disk on September 18, 1997; (6) a file
 27 named “Trouble - Gina draft,” last saved on the disk on December 5, 1997; (7) a
 28 file named “Bubble Factory 2,” last saved on the disk on January 30, 1998; (8) a
 file named “Bubble Factory 3,” last saved on the disk on May 1, 1998; (9) a file
 named “BubPunch.fdr,” created on the floppy disc on December 23, 2001; and (10)
 a file named “BubPunch.fdr,” created on the floppy disc on March 20, 2003. *Id.*

1 Pearson Decl. Ex. E. Again, without reviewing the files Mr. Cooper examined,
 2 Plaintiffs declared this evidence a “fraud” and charged ahead. *Id.* Ex. E-F.

3 To avoid needless cost, the Warner Defendants began work on this motion
 4 and gathered testimonial, documentary, and other forensic evidence of *TWTC*’s
 5 creation from Mr. Brown and various third parties. The Warner Defendants
 6 provided Plaintiffs this evidence, in the form of sworn declarations weeks before
 7 filing this motion. *Id.* Ex. G. This mass of evidence—which is limited in scope,
 8 and does not include all of the evidence one could gather⁵—includes the following:

- 9 • *The declaration of Neil Landau, Mr. Brown’s former screenwriting professor*
 10 *at UCLA.* Prof. Landau attests that Mr. Brown wrote *TWTC* in his class in
 11 the mid-1990s. Landau Decl. ¶ 5. Prof. Landau reviewed multiple drafts of
 12 Mr. Brown’s *TWTC* script in class, later workshops, and one-on-one writing
 13 consultations. *Id.* Prof. Landau attests that the versions of the script he
 14 reviewed in the 1990s contained all of the key story elements that Plaintiffs
 15 claim were stolen from *Omaha*. *Id.* ¶¶ 6, 13. Prof. Landau confirms he has
 16 no personal or financial interest in *TWTC*; that he had never seen nor heard of
 17 Plaintiffs or *Omaha* until this lawsuit, and that to date, he has still never seen
 18 or read *Omaha*. *Id.* ¶¶ 1, 15.
- 19 • *The declaration of Bill Sheinberg, co-founder of The Bubble Factory.*
 20 Mr. Sheinberg testifies that he reviewed *TWTC* in 1997 as a potential
 21 production project for his company and helped decide to option the script.
 22 Sheinberg Decl. ¶ 3. Mr. Sheinberg kept a *TWTC* file, in which he located a
 23 copy of Mr. Brown’s initial “September 1997” script that he submitted, as

25 ⁵ For example, at the outset of this case, counsel for the Warner Defendants
 received an unsolicited phone call from an agent saying that he remembered
 26 reading *TWTC* in the early 2000s and considering the script for one of his actor
 clients. He refuted Plaintiffs’ copying claims and volunteered to testify. Only in a
 27 desire to save costs and spare the Court’s time have the Warner Defendants not
 28 submitted more evidence like this. See Pearson Decl. Ex. G at 67.

well as a detailed Coverage Report of the script dated “September 14, 1997.” *Id.* ¶¶ 4-5, 17; Exs. A-B. This script and Coverage Report confirm that Mr. Brown’s 1997 *TWTC* script contained all of the story elements that Plaintiffs claim he stole from *Omaha*. Mr. Sheinberg identified two additional copies of the *TWTC* script from 1997 and 1998, which show the same, and he further submits the option agreements and extensions he negotiated with Mr. Brown for *TWTC*. *Id.* ¶¶ 8-10, 17 & Exs. C-H. He also provides several submission letters The Bubble Factory sent to actors and agents, including Dustin Hoffman and Paul Newman in 1997 through 2001 to generate interest in *TWTC*. *Id.* Exs. I-P. The letters describe *TWTC* as the very story that Plaintiffs falsely contend Mr. Brown stole—*i.e.*, a “character piece center[ed] on the relationship between a father and a daughter with the world of minor league baseball scouting as a back-drop.” *Id.* Ex. K. Mr. Sheinberg confirms he has no personal or financial interest in *TWTC* and never heard of Plaintiffs or *Omaha* until this lawsuit. *Id.* ¶¶ 1, 16.

- *The declaration of Gerard Bocaccio, a former executive at The Bubble Factory who now teaches at New York University.* Mr. Bocaccio read *TWTC* in 1997 and 1998, provided Mr. Brown notes on the script, and brought the project to The Bubble Factory. Bocaccio Decl. ¶ 4. He sent most of the submission letters that went to third parties to market *TWTC*. *Id.* ¶ 5. Mr. Bocaccio has no personal or financial interest in *TWTC* and never heard of Plaintiffs or *Omaha* until this lawsuit. *Id.* ¶¶ 1, 9.
- *The declaration of Marcy Morris, Mr. Brown’s former attorney.* Ms. Morris was involved in The Bubble Factory option deal, and located in her files a copy of Mr. Brown’s *TWTC* script dated “2/98,” as well as copies of the option agreements. Morris Decl. ¶¶ 3-4 Exs. A-C.
- *The declaration of Randy Brown.* Mr. Brown attests he wrote *TWTC* in Prof. Landau’s class in the mid-1990s, and that the script was complete by

1997, when he submitted it to The Bubble Factory. Brown Decl. ¶¶ 2-6, 10-
 12. He explains the origins of some key characters and elements in *TWTC*
 and describes his writing process and efforts to get *TWTC* produced in the
 1990s and early 2000s. *Id.* ¶ 10-12. Mr. Brown attests he never heard of
 Plaintiffs or *Omaha* before this lawsuit, and that he still has not seen or read
Omaha. *Id.* ¶ 1. He also states that as he wrote *TWTC*, he saved various
 drafts of the script on floppy disks, which he located in his desk at home after
 this lawsuit was filed. *Id.* ¶ 7-8 & Exs. A-J.

- *The report of Scott Cooper, a leading computer forensics expert.* Mr. Cooper analyzed Mr. Brown's seven floppy disks, and found 10 readable *TWTC* files. Cooper Decl. ¶ 8 & Ex. 1; *supra* n.4. He dated each file based on the date they were saved onto the disk, or in the case of two files that were created on the disk initially, the date they were created. *Id.* Ex. 1 at 3-4. His “observations and conclusions … are unambiguous”: “Every observation supports, and no observation contradicts that the ‘Trouble’ script was materially underway by 3/17/97.” *Id.* at 3.

The evidence is comprehensive and consistent. Mr. Brown wrote *TWTC* years before *Omaha* was created. SUF 1. This simple fact bars all of Plaintiffs' legal claims in this case, and Plaintiffs' wild, unsubstantiated claims that the Warner Defendants' evidence is a “fraud” cannot stave off this motion.

III. THE WARNER DEFENDANTS ARE ENTITLED TO JUDGMENT.

A. Prior Creation Bars A Claim Of Copying.

In order to prove the copying on which every one of their 12 claims for relief is based, *see supra* n.3, Plaintiffs must show (1) they own a valid copyright, and (2) unlawful copying. *See* M.B. & D. Nimmer, 4 NIMMER ON COPYRIGHT (“NIMMER”) § 13.01 (2011); W. Patry, 3 PATRY ON COPYRIGHT (“PATRY”) § 9:36 (2013).

Plaintiffs cannot meet the burden on the latter ground for one simple reason (among many others not raised in this motion). Copying may be established only

1 where plaintiff proves defendant had access, or an “opportunity[]... of viewing
 2 Plaintiff’s work *prior to the creation* of the infringing work.” *Bernal v. Paradigm*
 3 *Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1053 (C.D. Cal. 2010). “[I]t is
 4 well established that a prior-created work cannot infringe a later-created one,” as “it
 5 is impossible to copy something that does not exist.” *Christian v. Mattel, Inc.*, 286
 6 F.3d 1118, 1128 (9th Cir. 2002). The case law is well-established on this point.⁶

7 Courts decide this prior creation issue on summary judgment, *see, e.g.,*
 8 *Christian*, 286 F.3d at 1128 (affirming summary judgment; infringement claim
 9 “frivolous” in light of evidence of prior creation); *Bernal*, 788 F. Supp. 2d at 1053
 10 (summary judgment), and even at the Rule 12 stage, *see, e.g., Kenney v. Warner*
 11 *Bros. Entm’t, Inc.*, 2013 WL 6212593, at *2-3 (D. Mass. Dec. 3, 2013).

12 **B. Mr. Brown Created TWTC Many Years Before Omaha.**

13 1. Plaintiffs admit that they conceived of *Omaha* in 2004 and first wrote it
 14 (through a work-for-hire agreement with the Handfields) between 2005 and 2008.
 15 *E.g.*, FAC ¶¶ 46 (“[w]hile trying to figure out how to tell the story of an irascible
 16 baseball coach, manager, player or scout type character facing illness in the last
 17 chapters of his life and a daughter estranged from her father, Brooks set up the Gold
 18 Glove Productions offices in 2004”); 62 (“In early 2005, Brooks was looking to
 19 hire a screenwriter experienced in sports writing to collaborate with him on
 20 *Omaha*.); 94 (alleging Handfield produced final draft of *Omaha* in October 2008).
 21 “Allegations in a complaint are considered judicial admissions,” *Cortez-Pineda v.*

22 23 ⁶ *E.g., Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 5 (1st Cir. 1996) (“prior creation
 24 renders any conclusion of access or inference of copying illogical”); *Cottrill v.*
 25 *Spears*, 87 Fed. Appx. 803, 806 (3d Cir. 2004) (if “the only opportunity to view
 26 plaintiffs’ work occurs after defendants have completed their own work, then there
 27 can be no opportunity to copy the work, and thus no access”); *Selmon v. Hasbro*
 28 *Bradley, Inc.*, 669 F. Supp. 1267, 1271 (S.D.N.Y. 1987) (“if access is gained
 following a project’s completion, access becomes irrelevant”); 4 NIMMER, *supra*,
 § 13.02 (“when plaintiff’s dissemination occurs only after defendant’s work has
 already been created, then access is not established”); 3 PATRY, *supra*, § 9:37.

1 Holder, 610 F.3d 1118, 1122 (9th Cir. 2010), and Plaintiffs' admissions about when
 2 they first created *Omaha*—years after *TWTC* was created—bar their claims here,
 3 *see, e.g., Armour v. Knowles*, 512 F.3d 147, 153-54 (5th Cir. 2007).

4 2. The testimonial, documentary, and forensic evidence that the Warner
 5 Defendants submit confirms that Mr. Brown wrote *TWTC* in the 1990s, eliminating
 6 any possible basis for Plaintiffs' copying claims. SUF 1. While this evidence is by
 7 no means the entirety of the existing evidence proving that *TWTC* was not copied, it
 8 far surpasses the threshold required for summary judgment, as established by the
 9 relevant case law. To take several examples:

10 • In *Cottrill*, the court granted summary judgment in favor of singer Britney
 11 Spears and her collaborators because they wrote the allegedly infringing song
 12 *before* they could have accessed plaintiffs' song. Defendants submitted testimony
 13 that they had substantially completed their song and that Spears had recorded the
 14 accompanying vocal track before plaintiff created her allegedly infringed work. 87
 15 Fed. Appx. at 806-07. The district court relied on this testimony in finding there
 16 could be no infringement as a matter of law, and the Third Circuit affirmed. 2003
 17 WL 21223846, at *2, *7, *aff'd* 87 Fed. Appx. at 807.

18 • In *Fogerty v. MGM Grp. Holdings Corp.*, 379 F.3d 348, 353 (6th Cir.
 19 2004), the court granted summary judgment, holding that defendants could not have
 20 copied the theme song for the film *The World is Not Enough*. The court based its
 21 decision on testimony and personal calendars from defendants showing that they
 22 had worked on the song before plaintiff provided her song to MGM in February
 23 1999. It also relied on forensic evidence from a “demo” tape indicating that the
 24 song was last modified in January—a month before plaintiff wrote her song. *Id.*

25 • In *Bauer v. Yellen*, 548 F. Supp. 2d 88, 94 (S.D.N.Y. 2008), where the
 26 works at issue were screenplays, the court granted summary judgment based on
 27 defendant's and third parties' affidavits. They showed that prior to any review of
 28 plaintiff's script, defendant's script was “conceived, committed to script form,

1 registered ..., and shopped to more than one production company.” *Id.*

2 • In *Weygand v. CBS*, 1997 U.S. Dist. LEXIS 10613, at *13-16 (C.D. Cal.
 3 May 20, 1997), the court granted summary judgment in another screenplay case.
 4 The court relied on defendant’s written and audiotape treatments that he created
 5 before gaining access to plaintiff’s work, as well as testimony from two third
 6 parties to whom defendant had pitched his script. *Id.*

7 • In *Bernal*, 788 F. Supp. 2d at 1054-55, the court granted judgment based
 8 on defendant’s submission of evidence that the author wrote several drafts of the
 9 allegedly infringing *Desperate Housewives* script, and that agency began shopping
 10 author’s script, months before plaintiff submitted her script to the agency.

11 • In *Armour*, 512 F.3d at 154, the Court relied on a time stamp on a recorded
 12 DVD track of the song “Baby Boy” to grant summary judgment in favor of singer
 13 Beyonce Knowles. The DVD bore the stamp “February 13, 2003,” and plaintiff
 14 said she had submitted her song to the third party intermediary who could have
 15 provided access to Ms. Knowles in “late February”—after the fact. *Id.* at 153-54.

16 3. The Warner Defendants’ evidence well exceeds these showings.

17 First, Mr. Brown attests he never heard of Plaintiffs or *Omaha* until this case.
 18 Brown Decl. ¶ 1. This in itself defeats a claim of access. *See Jason v. Fonda*, 526
 19 F. Supp. 774 (C.D. Cal. 1981) (granting summary judgment on infringement claim
 20 where “plaintiff ha[d] not controverted the explicit denial” by defendants that “they
 21 had never heard of her book” prior to lawsuit), *aff’d* 698 F.2d 966 (9th Cir. 1982);
 22 *Selle v. Gibb*, 567 F. Supp. 1173, 1182 (N.D. Ill. 1983) (same; “before composing
 23 the accused song, [defendant] had never heard of plaintiff or his music”).

24 Second, declarations from Mr. Brown and four third-party witnesses show
 25 that *TWTC* was, in all material respects, completed by 1997.

26 • Mr. Brown and Prof. Landau both testify that Mr. Brown wrote *TWTC* in
 27 Landau’s screenwriting class in the mid-1990s. *Supra* at 4, 5-6. Indeed,
 28 *before this lawsuit was ever filed*, Prof. Landau published an article

1 documenting how Mr. Brown “wrote the first draft [of *TWTC*] in my class
 2 at UCLA.” Landau Decl. ¶ 11 & Ex. C.

- 3 • Sheinberg, Bocaccio, and Morris all attest they were involved with The
 4 Bubble Factory’s option deal for *TWTC* in 1997 and 1998. The scripts in
 5 their files show that *TWTC* was fully developed by that time. *Supra* at 4-
 6 5; Sheinberg Decl. Exs. A, C, F; Morris Decl. Exs. A-C.
- 7 • Bocaccio and Sheinberg testify that they not only reviewed Mr. Brown’s
 8 *TWTC* scripts in the late 1990s and optioned *TWTC*, they marketed the
 9 completed script to a wide variety of third parties to generate interest in
 10 the project. Sheinberg Decl. ¶¶ 3, 12-13; Bocaccio Decl. ¶¶ 5-7.

11 This testimonial and documentary evidence is confirmed by electronic media, *see*
 12 *supra* n.4, the forensic analysis of Mr. Cooper, *see* Cooper Decl., and multiple,
 13 dated hard copies of the script Sheinberg’s and Morris’s files, *see supra* at 4-5.

14 These 1990s versions of the *TWTC* script contain all of the elements of the
 15 *TWTC* movie that Plaintiffs allege were copied from *Omaha*. Some two months
 16 ago, defendants provided Plaintiffs with a chart sourcing these alleged copied
 17 elements to Mr. Brown’s 2/98 *TWTC* script. *See* Pearson Decl. Ex. B at 45-49.
 18 The percipient witnesses who have submitted declarations and the additional scripts
 19 cited in this motion confirm that these allegedly copied elements existed in the
 20 1990s *TWTC* scripts. *See* Brown Decl. ¶¶ 5, 10; Landau Decl. ¶¶ 13; Sheinberg
 21 Decl. Exs. A, C, F, W; Morris Decl. Ex. C. The Warner Defendants have again
 22 charted each claimed copied element from *Omaha* and sourced it to excerpts from a
 23 September 1997 version of the *TWTC* script. *See* Pearson Decl. Appendix 1. All of
 24 this shows that the only substantive differences between the 1990s versions of the
 25 *TWTC* script and the final 2012 movie version were minor story lines—*none of*
 26 *which Plaintiffs have ever alleged were copied*. *See id.*; Brown Decl. ¶¶ 20-21;
 27 Landau Decl. ¶ 10.

28

1 Third, still other documents from the 1990s show that the *TWTC* story has
 2 always been the same—and that it has *always* centered on the Gus/Mickey father-
 3 daughter storyline that Plaintiffs have falsely asserted was copied. *Cf.* FAC ¶ 108
 4 (calling *TWTC* a “counterfeit version of Gold Glove Productions’ father-daughter
 5 story”). To take just a few examples of such contemporaneous documents:

6 • Exhibit N to Mr. Sheinberg’s declaration is a submission letter that The
 7 Bubble Factory sent to Boaty Boatwright at International Creative Management on
 8 March 1, 1999. In the letter, The Bubble Factory describes the *TWTC* script it
 9 enclosed as exactly the sort of story that Plaintiffs say was stolen, *see id.*:

10 Set in the Carolina's amid the world of minor league baseball scouting, the
 11 piece is more about a father - daughter relationship than baseball per se. Gus
 12 Lobel's faculties are failing and his estranged, Sandra Bullock-daughter comes
 13 back as his eyes & ears in order to scout the next great phenom. Rich with
 baseball as metaphor for life, we think the piece turns on the academy award
 winning potential in that role.

14 Neither Mr. Brown—nor any defendant—stole Plaintiffs’ father-daughter idea.⁷

15 • Exhibit B to the Sheinberg Declaration—a September 14, 1997, “Coverage
 16 Report” of *TWTC* that he commissioned—proves the same. The Report bears a fax
 17 header date (copied below), confirming it was faxed on “Sept. 14, 1997”:

18

FROM : Everest Pictures

PHONE NO. : 818 999 9790

Sep. 14 1997 07:30PM PT

19
 20 *Id.* In a multi-page summary and analysis of the script, the Coverage Report details
 21 all of the plot points in *TWTC*—plot points, which under Plaintiffs’ conspiracy

22
 23

⁷ *Accord id.* Ex. K (Feb. 1998 Bubble Factory letter to Punch Productions: “This
 24 terrific character piece centers on the relationship between a father and a daughter
 25 with the world of minor league baseball scouting as a back-drop.”); Ex. M (Oct.
 26 1998 letter to CHAL Productions; same); Ex. P (Jan. 2001 letter to ABC/Disney:
 27 “THE TROUBLE WITH THE CURVE by Randy Brown is a very contemporary
 28 father/daughter dramedy that plays out in the Carolina's amid the world of minor
 league baseball scouting. The focus of the movie has to do with the daughter's
 return into the life of her estranged father who is suddenly losing his eyesight and
 ad hoc, his ability to stay in baseball; his reason for living.”).

1 theory, Mr. Brown *only stole from them some 10 years later.* *Id.* at 125-29. But all
 2 one needs to do to see how frivolous Plaintiffs' copying claims are is to compare
 3 their complaint to the opening summary in the Coverage Report, which states:

4 **Log Line:** Mickey Lobel is a 30 year old recent graduate from law school, and has the
 5 world at her feet when she lands a job with the most prestigious law firm in town.
 6 Overjoyed with her accomplishment, her elation soon changes to shock and sadness when
 7 she finds out that her father, Gus, a famous baseball scout for the Braves with a respected
 8 career, has just been diagnosed with glaucoma. Knowing that he can no longer do his
 9 job, and that his colleagues are talking about his recent difficulties and the possibility of a
 10 forced early retirement, she puts her life and career on hold to be his eyes, and to help him
 bring in the best of the new recruits. With thirty years of smothered feelings between
 them after the loss of her mother and his wife, the two develop a new, mutually respectful
 relationship, and embark on a new phase in their lives with the baseball diamond serving
 as their backdrop.

11 *Id.* at 124.⁸

12 Indeed, this summary of *TWTC* from the 1997 Coverage Report mirrors the
 13 summary of the 2012 *TWTC* movie printed on the DVD, *see* Pearson Decl. Ex. A:

14 Gus Lobel (Clint Eastwood) has been a top baseball scout for decades
 15 but age has caught up with him. He refuses to be benched for what
 16 could be the final innings of his career. The Atlanta Braves' front
 17 office is questioning his judgment, especially with a hot batting
 18 phenom on deck for the draft. Enter Gus's estranged daughter, Mickey
 19 (Amy Adams), an ambitious attorney on the partner track who joins
 20 him on a scouting trip, jeopardizing her own career to save his. Justin
 Timberlake also stars as a rival scout with his sights on a career in the
 announcer's booth – and his eyes on Mickey – in an entertaining tale
 "filled with heart, humor and fantastic acting."

22 ⁸ If there were any question whether the "Johnny" character existed in the 1997
 23 version of *TWTC*, below is an excerpt from the Coverage Report confirming his
 24 role in the 1997 script as well, *e.g., id.* at 126:

25 At their first destination in Carolina, [Gus and Mickey] settle in to the
 26 "Take It Or Leave It" motel where Mickey and Johnny Flanigan, have
 27 an unfortunate run-in. At a later meeting with Gus in attendance, he
 28 realizes that he scouted Johnny years ago and that he used to be a player
 for the Yankees for a short time, and the two enjoy a warm exchange....
 Mickey and Johnny continue to get closer as she confides in him again,
 this time about her frustration with her father....

1 On these facts of prior creation, there is no reasonable basis to allow any of
 2 Plaintiffs' copying claims to proceed. *See supra* at 6-9 (canvassing case law); *see*
 3 *also Gen. Universal Sys. v. Lee*, 379 F.3d 131, 147-48 (5th Cir. 2004); *Berry v.*
 4 *Deutsche Bank Trust Co. Ams.*, 632 F. Supp. 2d 300, 302, 305 (S.D.N.Y. 2009).

5 **C. Plaintiffs' Efforts To Stave Off Judgment Are Without Merit.**

6 Plaintiffs have provided the Warner Defendants with no competent evidence
 7 contesting this lynchpin date-of-creation issue. Instead, they attack defendants'
 8 proffered evidence, calling it (1) a "fraud"; (2) sponsored by "biased" witnesses;
 9 and (3) contravened by experts whose alleged reports Plaintiffs refuse to disclose.
 10 Pearson Decl. Exs. C, E at 57, F, H at 71, I. None of these responses has merit.

11 1. Plaintiffs' tactic of "questioning the authenticity of virtually every piece
 12 of information provided by defendants" is unsustainable under copyright law,
 13 *Bauer*, 548 F. Supp. 2d at 94; *see Cottrill*, 87 Fed. Appx. at 807; as well as Rule 56,
 14 *see, e.g. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
 15 (1986). Pronounce as they might that the *TWTC* scripts from Mr. Sheinberg's and
 16 Ms. Morris' files are "forgeries"; that the Coverage Report and *TWTC* submission
 17 letters are a "fraud"; and that the computer and other evidence is "fabricated," they
 18 have provided no competent evidence to support these grave claims.

19 Courts regularly reject such attacks on prior-creation evidence. In *Bauer*,
 20 548 F. Supp. 2d at 94, the court rejected plaintiffs' repeated challenges to the
 21 authenticity of early versions of defendants' allegedly infringing script, holding that
 22 plaintiffs' unyielding questioning of defendants' evidence was "conjecture" and
 23 insufficient to defeat summary judgment. *Accord, e.g., Scott-Blanton v. Universal*
24 City Studios Prods. LLLP, 539 F. Supp. 2d 191, 200 (D.D.C. 2008).

25 The same should hold true here. Plaintiffs' wild claims that defendants must
 26 have manufactured the evidence—given that, *e.g.*, Mr. Brown did not register his
 27 *TWTC* scripts with the U.S. Copyright Office or Writer's Guild, *see* Pearson Decl.
 28 Ex. E at 58, I at 74—not only ignore all of the independent creation evidence above

1 (most of it from third parties), they ignore that Mr. Brown had *no duty* to register
 2 his scripts either to protect them, or to prevail in this lawsuit, *see NIMMER, supra*,
 3 § 7.16 (“as to works created on and after January 1, 1978, the effective date of the
 4 current Copyright Act, registration is not a condition to obtaining copyright”); *id.*
 5 § 14.10[B][2] (the Copyright Act’s “registration requirement is nonsymmetrical”
 6 and does not apply to defendants accused of infringement); *Latin Am. Music Co. v.*
 7 *Am. Society of Composers*, 642 F.3d 87, 90 (1st Cir. 2011) (same).⁹

8 2. Nor can plaintiffs preclude summary judgment by saying that defendants’
 9 witnesses are “biased.” Pearson Decl. Ex. E at 57, H at 71, I at 76. To begin,
 10 besides Mr. Brown, each declarant attested he or she has no interest in *TWTC*,
 11 *supra* at 4-5, and *none* except Mr. Brown is a party. Moreover, where defendants
 12 have supported their motion “with affidavits, declarations, and documentary
 13 evidence” from independent, percipient witnesses, a plaintiff’s “challenges to the
 14 weight of the evidence and the credibility and bias of potential witnesses do not
 15 create triable issues of fact that would preclude summary judgment.” *Siddiqui v.*
 16 *AG Commc’ns Sys. Corp.*, 233 Fed. Appx. 610, 612-13 (9th Cir. 2007).¹⁰ Indeed, in
 17 the copyright context, courts make clear that “a copyright plaintiff cannot base her

18 ⁹ Also without basis are Plaintiffs’ speculative claims of access in the late 2000s
 19 to *Omaha*—which are predicated *not* on Plaintiffs ever sharing *Omaha* with the
 20 Warner Defendants, but an unproven conspiracy, based on no actual evidence, of
 21 allegedly unscrupulous agents indirectly sharing *Omaha* with the Warner
 22 Defendants. *See, e.g.*, FAC ¶¶ 182-93. Such conspiratorial theories of access are
 23 irrelevant in any event, as the prior creation evidence above shows that Mr. Brown
 24 completed *TWTC* *seven years before* *Omaha* was conceived. Moreover, the late-
 25 2000s theory of access is unproven, speculative, and unsustainable. *See, e.g.*, *Art*
Attacks Ink, LLC v. MGA Entm’t Inc., 581 F.3d 1138, 1143 (9th Cir. 2009); *Rice v.*
Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003); *King v. Najm*, Case No. CV
 08-4164, Docket No. 116 (DSF) (C.D. Cal. Mar. 8, 2011).

26 ¹⁰ *Accord, e.g., Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001);
 27 *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co.*, 701 F.2d 95, 97
 28 (9th Cir. 1983); *Linder v. Pac. Dataware, Inc.*, 1997 WL 91713, at *5 (D. Or. Jan.
 15, 1997).

1 opposition to summary judgment entirely on the hope that a fact finder will
 2 disbelieve the persons who have submitted affidavits on issues of access.” *Eaton v.*
 3 *NBC*, 972 F. Supp. 1019, 1024 (E.D. Va. 1997).

4 3. Plaintiffs finally claim that they have gathered expert reports—which they
 5 refuse to disclose—opining that *Omaha* and *TWTC* “are not only substantially
 6 similar but strikingly so,” meaning Mr. Brown likely copied *Omaha*. Pearson Decl.
 7 Ex. I at 75. Such so-called expert reports—from non-percipient witnesses, who
 8 cannot know whether Mr. Brown wrote *TWTC* in the 1990s, as various eye
 9 witnesses attest he did—are legally irrelevant. The failure to establish access to an
 10 infringing work renders argument concerning similarities legally meaningless.
 11 Indeed, no amount of similarity “warrant[s] an inference of copying to the extent ...
 12 plaintiff fails to establish prior creation.” 4 NIMMER, *supra*, § 13.02; *see Stewart v.*
 13 *Wachowski*, 574 F. Supp. 2d 1074, 1092, 1101 (C.D. Cal. 2005) (as matter of law,
 14 evidence of “striking similarity” cannot overcome lack of proof showing access to
 15 allegedly infringed work); *Kenney*, 2013 WL 6212593, at *3.

16 In *Stewart*, Judge Morrow held that “the Ninth Circuit follows the majority
 17 rule that striking similarity will support an inference of access only when such an
 18 inference is reasonable in light of the totality of the evidence in the record.” 574 F.
 19 Supp. 2d at 1100. Striking similarity does not “obviate[] the need to prove access,”
 20 *id.* at 1098-99, where the defendant’s work predates the allegedly infringed work or
 21 where claims of access are otherwise implausible, *id.* at 1101.

22 The majority rule that Judge Morrow cited included her reliance on cases like
 23 *Fodor v. Time Warner, Inc.*, 1994 WL 65287, at *2 (9th Cir. Mar. 2, 1994). There,
 24 the court granted summary judgment for defendant, holding that “if [defendant] did
 25 not have access to the screenplay prior to the writing of [the movie], even striking
 26 similarities between the two works must be deemed fortuitous.” 1994 WL 65287,
 27 at *2 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)). The
 28 same is true of *Selle*. There, defendants submitted evidence that they never heard

1 of plaintiff or his music before composing their song. Thus, “it matter[ed] not,
 2 despite the testimony of plaintiff’s expert, how strikingly or substantially similar
 3 the two musical compositions” were. 567 F. Supp. at 1182. Given the
 4 overwhelming evidence that Mr. Brown had no access to *Omaha* when he wrote
 5 *TWTC*, *supra* at 3-6, 9-13, any alleged “similarity” is simply irrelevant.¹¹

6 **IV. CONCLUSION**

7 There are many reasons to dismiss this case with prejudice, but one screams
 8 out now clearly: Mr. Brown created *TWTC* years before *Omaha*; he did not copy it.
 9 Defendants’ motion for summary judgment should be granted, and this wasteful
 10 and misguided case should be brought to a decisive end.

11 Dated: December 4, 2013

Respectfully submitted,

12 O’MELVENY & MYERS LLP

13 By: /s/ Matthew T. Kline

14 Matthew T. Kline
 15 Lead Counsel for Warner Defendants

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¹¹ Defendants raised this legal defect with Plaintiffs many times, and they never
 26 cited a single case addressing why their expert reports were relevant. See Pearson
 27 Decl. ¶ 6; Exs. G at 69, J. Also, as defendants made clear to Plaintiffs, their claims
 28 of “similarity” were without basis in any event. See Pearson Decl. Ex. B at 49
 (explaining how claimed copied elements were, *inter alia*, scenes-à-faire).